

Streamlining the UK's Competition Authorities

A Paper from European Policy Forum

1. This note reflects upon the current debate on the potential restructuring of UK competition authorities and their functions. It sets out some of the ideas currently circulating about how to streamline them and make them more effective.
2. The subject is multi dimensional with many complexities and nuances. This is in part because in addition to two primary competition authorities there are also authorities, the economic regulators, who combine competition powers with their other roles. This note is designed to set out options and possibilities rather than attempting firm conclusions.
3. The **Competition Commission** has 122 staff, a budget of £21.5million and an enviable lineage since its predecessor the Monopolies Commission, was first established in 1948. Prior to the passage of the *Enterprise Act 2003* its budget was much smaller with 82¹ staff and a budget of £7.5² million. Its particular strengths are the thoroughness of its work and the calibre of its members and staff. It cannot initiate inquiries itself but responds to references made to it primarily by the Office of Fair Trading but also by the sector regulators.
4. Concerns about the length of CC market investigations (which can last up to two years) have been expressed. Their ultimate conclusions often command support although CC processes, like those of other bodies in an increasingly litigious environment, are nowadays regularly challenged. This may be inevitable given the commercial outcomes at stake. Although it costs much less than the Office of Fair Trading and is seen as more scholarly and less bureaucratic in approach, its costs are not insignificant. Some believe that its approach is elongated and out of line with fast moving markets. Certainly if its recommendations are appealed or require governmental action it may take years after a reference before things change.
5. The **Office of Fair Trading** has 642 staff³ and a total net resource requirement of £66.1million⁴. Its size and cost increased dramatically during the last government from 409⁵ staff and £20.2 million budget⁶ in 1997. The increase was expected to result in more vigorous enforcement of the Competition Act. Its functions currently extend across consumer protection, consumer credit, merger references, and it has been proposed that it gain the competition powers of Ofgem. It has been suggested that it should take over the concurrent competition powers of other sector regulators. There have also been suggestions that it should be merged with the Competition Commission into a single authority. Its Chief Executive, John Fingleton, has made public his concern about what he sees as "the current fragmentation of the [competition] regime".⁷
6. Under current government consultations it is proposed that the OFT's remit to supervise consumer protection in financial services, affecting 99,000 firms, should be transferred to a new Consumer Protection and Markets Authority, which would also take over the consumer powers of the Financial Services Authority. Similar though less detailed plans

exist for OFT work on economic crime to be transferred to an Economic Crime Agency which would also take over economic crime powers of the Serious Fraud Office and FSA.

7. These changes would reduce the size and scope of the OFT's functions considerably. They make the possibility of a merger with the Competition Commission more viable – a combined authority would not in these circumstances be a giant handling everything to do with competition and the consumer, especially if, as expected, government decides also to seek a streamlining of consumer bodies and to concentrate these around Consumer Focus or the Citizens Advice Bureau network.

A CC-OFT merger?

8. What are the advantages and disadvantages at first sight of a OFT-CC merger? Obvious advantages are:
 - a. A concentration of skilled staff resources and opportunities to rationalise these.
 - b. A streamlined and comprehensive authority focused on competition.
 - c. An opportunity to bring into the new authority the concurrent competition powers of sector regulators which have been little used.
 - d. Potential cost savings (but note that the CC and OFT have relatively long leases on their current buildings).
 - e. The opportunity to blend benefits of the CC's more 'academic' and 'lay member' approach with the OFT's administrative and enforcement attitudes.
9. Against this there are some obvious risks:
 - a. There is a reduction in "regulatory competition".
 - b. Thoroughness and a fresh look on referral may be weakened in a streamlined and speeded-up procedural regime.
 - c. Appeal and review systems will become more important: can they take the strain?
 - d. The role of expert and independent lay members may be seriously attenuated unless it is carefully designed into a new authority.
10. If such changes were contemplated the importance of a highly regarded and well functioning appeal system would increase. How could present arrangements cope or be developed in this context?
11. The Competition Appeal Tribunal has 11 full time staff and an overall budget of between £3-4million. It has a full time President, three part time Chairmen and 17 members. The Chancery Division judges of the High Court may also serve as Chairmen. Its original role to hear appeals under the Competition Act was extended to the Enterprise Act to include reviews of market investigations and merger decisions and to hear certain actions for damages for breach of competition law. It also has what its President, Mr Justice Barling, has called a "patchwork quilt of appeal roles in connection with the utility sector"⁸. The CAT is seen to have performed well as a specialist tribunal although the Court of Appeal has been eager to interpret its powers and jurisdiction strictly. Its case law is well

regarded and it effectively aligns UK law with the case law and development of the EU competition regime.

12. The CAT's active case management has speeded up the appellate process but this can still be slower than ideal. Not all appeals go to it: price control appeals under the *Communications Act 2003* go to the Competition Commission. Judicial review proceedings under the Competition Act 1998 go to the Administrative Court from the OFT. On the general question of appeals John Fingleton noted in the article earlier quoted that "The various complex appeal processes for regulators, for example, may not be appropriate as they can take a lot of time, protect incumbents against rapid change, stall new entry and innovation and can cause delay in delivering better market outcomes".
13. The CAT treads a difficult balance between the procedural formalities of the judicial system, with parties almost invariably represented by QCs or senior barristers, and the insights of its lay members. It is more legalistic than the CC with a judicial, adversarial procedure and lacks its ability to research issues in depth, notwithstanding the fact that it has powers to substitute its own decision for those of the OFT or sector regulators whose decision is being appealed under the Competition Act.
14. On the whole the CAT is seen as a successful appeal tribunal and is now familiar to, and appreciated by, competition lawyers, economists and academics. Overall it could become an effective appellate body in a reconfigured regime provided that it did not become too legalistic. It might, for example, be worth turning the current panels of three members into panels of five to ensure that economic, business, consumer and other interests were fully represented.
15. If the system is restructured along these lines it might make sense to transfer some appeals which currently go to the CC to the CAT. These include appeals and references under the *Energy Act 2004*, *Communications Act 2003* and disputes over licence modifications by sector regulators for utilities. Price control determinations which tend to require more complex staffwork might be excluded from such a transfer.
16. Such a tidying up could help make the CAT a 'one stop' appeal body. It could also make sense to extend the CAT's jurisdiction to entertain challenges to the validity of case closure decisions by competition authorities. As it already hears follow-on actions for damages for breach of the competition rules it would also be logical for it to hear stand alone claims for such breaches which do not follow a ruling by competition authorities.
17. Whilst the Office of Fair Trading has a board with some particular and strategic decision making powers, members of the Competition Commission sitting in groups actually determine each decision of the Commission on matters referred to it. This is a profound difference between the two approaches which merits careful consideration when considering the design of any future authority.
18. In 2009/10 the Competition Commission had 34 members in addition to its chairman and three deputy chairmen. It also has a Council who act as board members and a panel of advisors. Although it is difficult to characterise each of its members exactly, as many have

varied experience, broadly speaking 10 of the Commission's current members are **economists**, 8 are **chartered accountants** or **finance directors**, 8 come from the **world of business** and 6 are **lawyers**. There are 2 former **civil servants** and one **consumer affairs specialist** among the current membership.

19. This compares with the 31 members who served in 1998-9, in addition to the Chairman and two deputy chairmen. The members then included 9 from the world of **business**, 5 **chartered accountants or finance directors**, 5 **former civil servants**, 4 **economists**, 4 **lawyers**, 3 **trades unionists** and 1 **consumer affairs specialist**.
20. It is notable that the current membership is much more heavily tilted towards economists and those trained in accountancy and finance. The change may reflect a general trend for the Competition Commission to be more economist-minded in its approach. Trades unionists seem to have disappeared from the Commission's membership.
21. Those who have served as members of the Competition Commission and its predecessor bodies or have chaired its inquiries see it as important that the role of lay members is decisive and not ornamental. Members do not see their role as to offer judicious advice, encouragement or warning to the inquiry chair; they see their role as being to decide the case as equals.
22. The ethos of the Commission, in which every member is expected to have mastered every aspect of an inquiry and to be able to debate it with colleagues from a position of full mastery of the voluminous materials, is valuable. It guards against any inclination to top-down decision-making, ministerial or external interference or lobbying. It is a powerful means of giving a fair hearing to those subject to inquiries and to witnesses.
23. Another benefit of the approach is that members automatically bring with them relatively up-to-date perspectives and knowledge of the market environment. They form a balanced group bringing together business, economics, finance and customer awareness. This is likely to prove an effective means of aligning the issues in an inquiry with the prevailing market environment.
24. Independent lay members may of course lack some skills. It is notable that, for example, the Commission recently announced a work stream to improve its approach to remedies, an area where specialised skills can be needed to design effective remedial solutions. Equally lay members who contribute part-time but have many other interests and roles in the economy may trigger difficulties if their involvement generates real or perceived issues of conflicts of interest. Such a case is currently going through the judicial system.
25. A theoretical possibility in terms of streamlining approaches would be to reduce the number of Commission members. The Federal Trade Commission in the United States of five full time Commissioners supervise the operation of the FTC. But this would replace the hands-on decision taking role of members with a more administrative culture and would therefore risk weakening the Commission's independence and changing its ethos.

26. Alternatively it might be possible to reduce the size of groups. But group sizes have not proved problematic in the past and the cost savings would be negligible compared with the loss of potential expertise. A further option would be to rebalance Commission membership which at the moment looks rather overweight in economists and underweight in members directly familiar with retail customer concerns.

Concurrency

27. The powers of sector regulators to exercise a concurrent jurisdiction with the Office of Fair Trading were well set out by Nick Pimlott in a recent issue of the Competition Law Journal.⁹ “Thus sectoral regulators share the same powers as the OFT to enforce both the UK and EU competition rules in their respective sectors. Sectoral regulators also enjoy the same powers as the OFT to make market investigation references to the Competition Commission under part 4 of for the *Enterprise Act 2002*, as well as the duty to handle super complaints from designated bodies. The concurrency regime extends not only to the application and enforcement of the prohibitions themselves, but also to the OFT’s powers of investigation and the oversight of the sectoral regulators’ Competition Act decisions by the Competition Appeal Tribunal in appeals under section 47 of the Act”.

28. An obvious potential area for streamlining is the concurrent competition role currently held by sector regulators. There has been much debate about a number of aspects of this role. Originally it was expected that ex-ante regulatory powers would gradually fade away in favour of the application of general competition law. The small number of *Enterprise Act* references by the sector regulators suggests that they prefer to use their licensing powers; they tend to have a relatively small group of staff specialising in competition matters: There have been proposals to transfer the competition powers of one of them, Ofgem to the Office of Fair Trading in a forthcoming Energy Bill, although these ideas are now included in a more general review of Ofgem.

29. As Margaret Bloom, a former senior official of the OFT, has noted¹⁰ “the sector regulators have generally preferred to use their regulatory powers rather than the *Competition Act*. They have made only two infringement decisions – both were Chapter II. There is a good case for reviewing whether concurrency ensures that the competition powers are enforced fully”. Overall, she notes, the OFT and the sector regulators made 24 infringement decisions over the ten years of the Act and the process took significantly longer than expected with the most recent cases taking three and seven years respectively from initial receipt of information to a decision. Margaret Bloom says “would more and faster decisions, especially infringement decisions, have delivered real benefits? In my view – yes”. Enforcement decisions, she argues, are important for deterrence and to provide clarity to business over compliance with the law.

30. Noting that within the EU only in Greece and the UK do sector regulators have concurrent powers, Margaret Bloom helpfully sets out the arguments made for and against concurrency at the time it was introduced;

- Concurrency would maintain the current position in that the sector regulators already had some concurrent competition powers under the *Fair Trading Act 1973* and the *Competition Act 1980*.
- The regulators had developed considerable specialist expertise and knowledge of their sectors.
- There was an overlap between the licence regimes and competition law.
- Concurrency would encourage regulators to move from using regulation to using competition powers. Some of the regulators stated that concurrent Competition Act powers should enable them to consider the removal of licence conditions.

However, there were also some very sound arguments against concurrency. These were:

- Concurrency is rare in other jurisdictions. Within the EU, only in Greece (telecommunications and post), Ireland (communications) and the UK are sector regulators empowered to enforce the EU competition rules in specific sectors.
- The regulators lacked experience of EU competition analysis and investigations.
- There would be a less efficient use of resources given the number of bodies that would be applying competition powers.
- There was a risk of inconsistency in the application of the new law.
- Some companies with operations in a number of sectors were concerned that the new powers would increase the risk of double jeopardy or conflicts between authorities. A similar concern applied to agreements which involved more than one regulated sector such as an agreement between a gas and an electricity company.

31. Various bodies and individuals have made suggestions as to how the perceived concurrency problem might be addressed.
32. A House of Lords Select Committee on Regulators in 2007 recommended retaining existing concurrency arrangements but with the Office of Fair Trading and the sector regulators working more closely together and complainants given the option of raising infringement issues with the Office of Fair Trading directly.
33. An earlier report by the Department for Trade and Industry and HM Treasury in 2006 had made similar recommendations and proposed procedural improvements for sharing resources and expertise between the Office of Fair Trading and the sector regulators. It also noted that the time and cost of the appeal system was a problem.
34. In its recent review of the competition law regime in 2010 the National Audit Office suggested that the incentives for regulators should be evaluated to see whether they were currently appropriate to generate a body of case law which was sufficient to be effective.
35. At an NAO seminar held at Linklaters on Tuesday 18 May 2010 Michael Cutting a partner at Linklaters in the Competition/Antitrust Group suggested that there was a need to develop a greater cadre of skilled and experienced enforcers and a stronger process of the use of the regulatory toolkit. He suggested that centralising enforcement decisions at the Office of Fair Trading might do that.

36. In the article already quoted, John Fingleton, the Chief Executive of the Office of Fair Trading suggested that “One idea that might be considered would be to require all concurrent regulators with competition (and consumer) enforcement powers to consider applying general competition and consumer law first and only after that to resort to the sector-specific ex-anti regulation” – in other words, to give competition (and consumer) enforcement primacy. Ofcom already take a similar approach
37. Although there have been recent signs that, perhaps prompted by a developing debate, sector regulators may refer more market issues to the Competition Commission the general perception seems to be that they intuitively prefer to use licensing powers over which they have greater control and which do not require handing the issue to the Competition Commission and potentially to the Competition Appeal Tribunal. This makes the case for shifting their concurrent powers to a new competition authority a potentially attractive one.
38. The obvious alternative is to adopt John Fingleton’s suggestion and Ofcom practice and to require sector regulators to give priority to competition enforcement action and provide evidence that these powers would for some reason not be effective before turning to ex-ante regulatory approaches. Such a change in the statutory duties of regulators could probably be aligned with the results of the general reviews of Ofgem and Ofwat and potentially other sector regulators, which are currently underway and will eventually provide an opportunity for legislative changes.

Concluding observations

39. The most profound question facing those contemplating an OFT-CC merger is which culture they wish to prevail: the ‘group of lay members’ culture of the CC, or the administrative culture of the OFT.
40. There are risks in concentration of the competition authorities as well as in the markets they police. It would be dangerous for example if the result of such a concentration meant that they felt in practice more beholden to government, or less capable of challenging conduct by those with government’s ear.
41. In this regard there is much to be said for a system which depends on a relatively large number of part time lay members. They have nothing to seek from government: especially if appointed for a long single term they have no incentive to curry favour in the hope of reappointment. Subject to effective procedures to avoid real or perceived conflicts of interest they are unlikely to be influenced by commercial pressures either. And a well-constructed group can bring up-to-date legal, financial, business, consumer and economic expertise to bear on complex cases, utilising but not being dominated by expert staffwork. Whether serving on

the competition authority or indeed in sector regulators they can prove a valuable defence against regulatory capture in the system.

42. Were such a merger to occur it would make sense to tidy up appeal arrangements to make the Competition Appeal Tribunal more of a one-stop shop. At present it handles a patchwork quilt of appeals.
43. It might do no harm to reduce the risk of the CAT becoming dominated by procedural legalism by expanding the role of its own lay members. Tribunals of five, rather than three members could help achieve this objective even if it is unavoidable that in every case the Tribunal is chaired by a judge or senior lawyer.
44. The concurrent powers of sector regulators have been problematic since they were introduced. Regulators have shown an inclination to use their regulatory rather than their competition powers in much the same way that the long-anticipated shifts from ex-ante regulation to enforcement of general competition law in large part remain unfulfilled aspirations. Although most regulators can now point to some use of their competition powers it may, on balance, be better to give competition powers to competition authorities and regulator powers to sector regulators.
45. As an indication of how the competition authorities would look if the approach taken in this note were to be adopted charts attempting to show the current and potential systems are attached, building upon one used in the NAO's report of earlier this year.

European Policy Forum

October 2010

¹ As at 31 March 2001, *Competition Commission Annual Review and Accounts*

² As at 31 March 2001, *Competition Commission Annual Review and Accounts*

³ As at 31 March 2010, *OFT Annual Report and Resource Accounts 2009/10*

⁴ Plus a further allocation of £1.8m capital expenditure, *OFT Annual Report and Resource Accounts 2009/10*

⁵ *OFT Annual Report 1996/97*

⁶ *OFT Annual Report 1996/97*

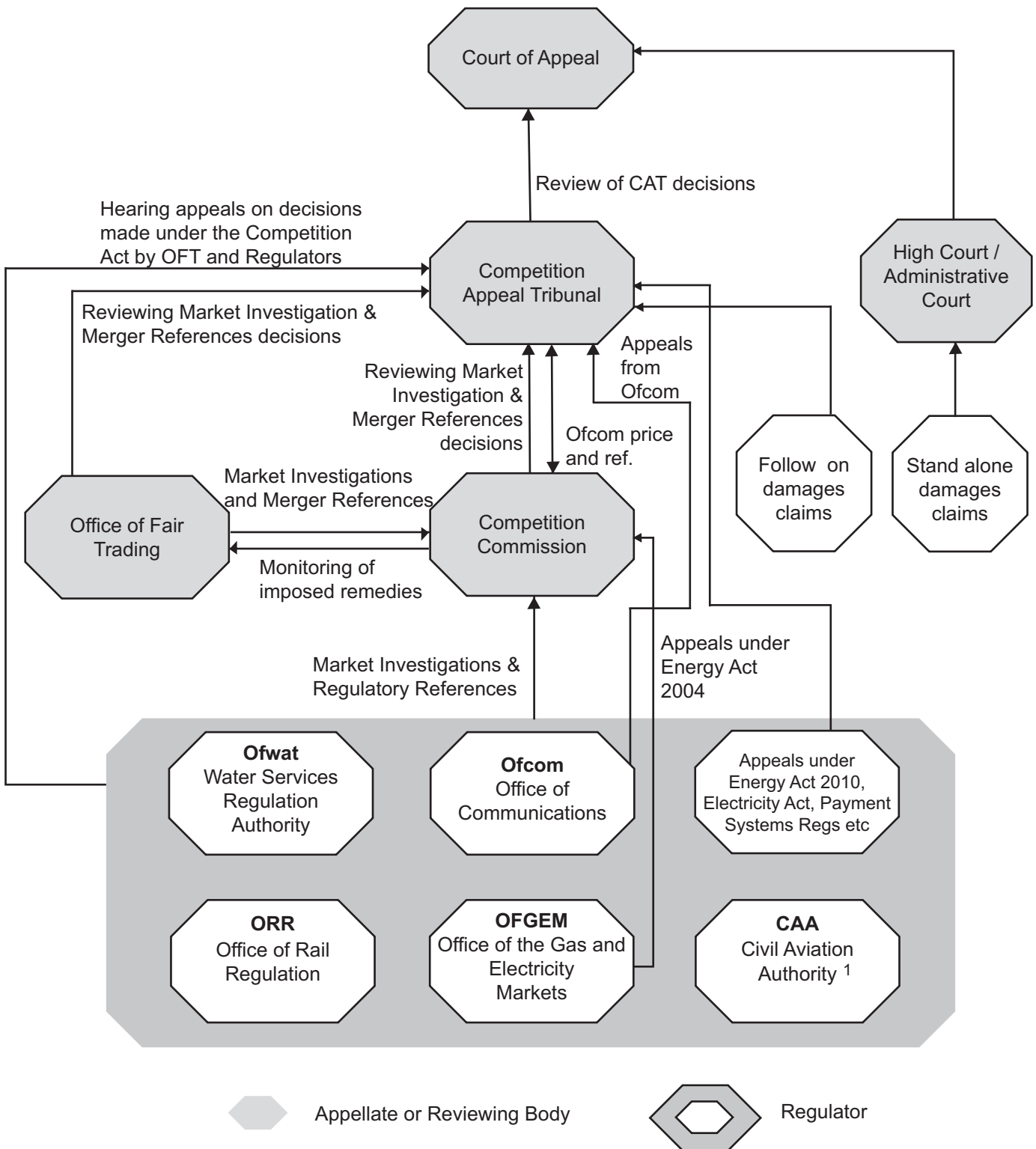
⁷ Challenges and opportunities for the competition regime, [2010] Comp Law 301-312.

⁸ Speech to Blackstone Chambers Regulation Conference, 14 May 2010

⁹ [2010] Comp Law 162-178

¹⁰ [2010] Comp Law 141-161

The current UK competition regime

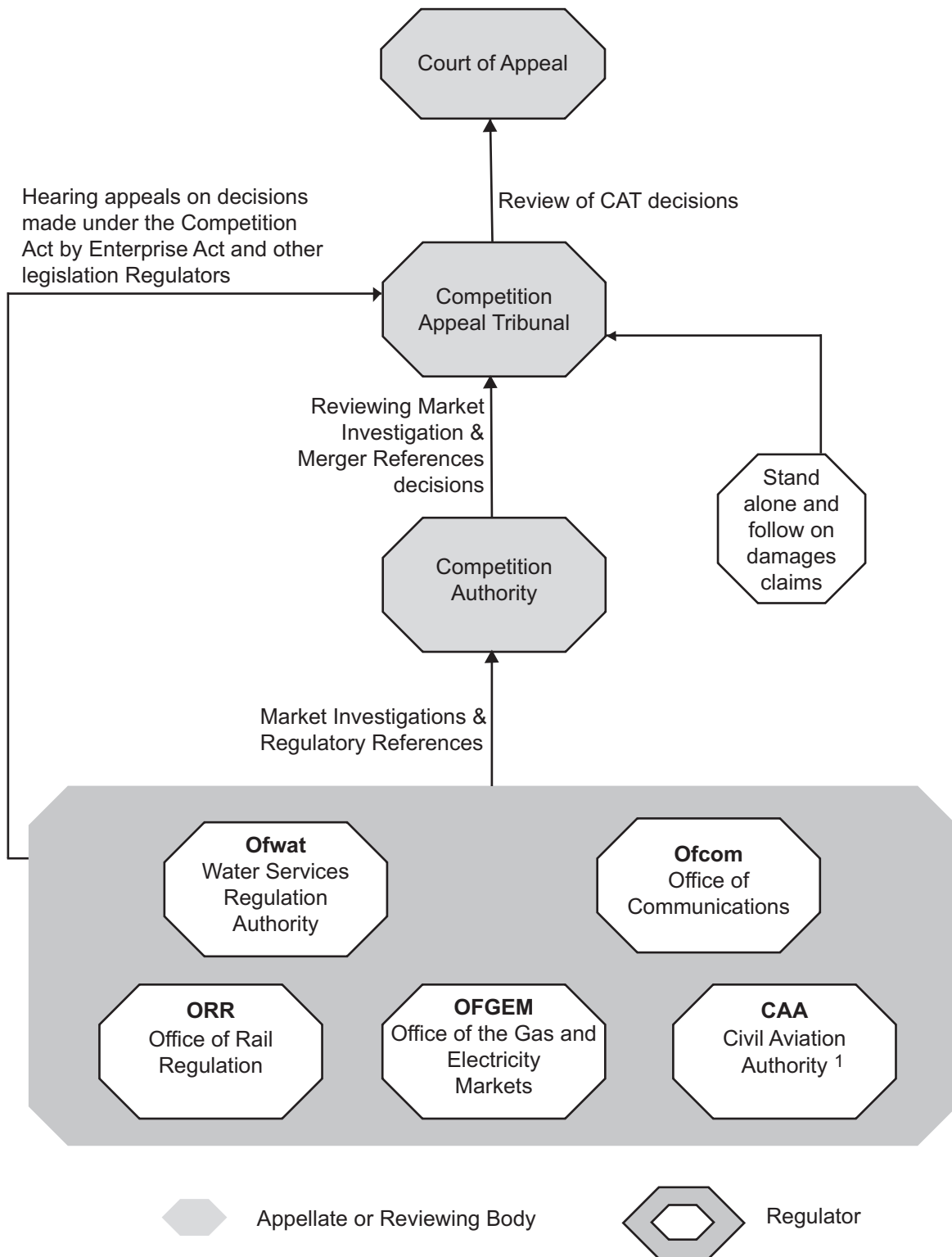


Source: Amended from National Audit Office, Review of the UK's Competition Landscape March 2010

Notes:

1. The Civil Aviation Authority has powers to make a market reference of the Air Traffic Control Services market only.
2. The Secretary of State may also make a reference to the Competition Commission on grounds of public interest.
3. The diagram omits the Supreme Court of the UK and the European Court of Justice, both of which are in the judicial structure which includes the Tribunal. It also omits the Northern Ireland Authority for Utility Regulation.
4. The Court of Appeal's jurisdiction only extends to England and Wales. The equivalent court in Scotland is the Court of Session, and in Northern Ireland, the Court of Appeal of Northern Ireland.

A possible new UK competition regime



Source: Amended from National Audit Office, Review of the UK's Competition Landscape March 2010

Notes:

1. The Civil Aviation Authority has powers to make a market reference of the Air Traffic Control Services market only.
2. The Secretary of State may also make a reference to the Competition Commission on grounds of public interest.
3. The diagram omits the Supreme Court of the UK and the European Court of Justice, both of which are in the judicial structure which includes the Tribunal. It also omits the Northern Ireland Authority for Utility Regulation.
4. The Court of Appeal's jurisdiction only extends to England and Wales. The equivalent court in Scotland is the Court of Session, and in Northern Ireland, the Court of Appeal of Northern Ireland.